No. 06-1602

In The

Supreme Court of the United States

CHRISTOPHER ANDREW PHILLIPS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

TERRENCE W. KIRK
Texas Bar No. 11513500
502 West 13th Street
Austin, Texas 78701
(512) 236-8511
(512) 476-5346 (Fax)
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
ADDRESS TO THE COURT	1
THE GOVERNMENT'S ARGUMENT	1
PETITIONER'S REPLY ARGUMENT	2
I. THIS COURT'S DECISION IN *CHAPMAN* DID NOT UNDERMINE ITS DECISION IN *STIRONE*	2
II. THIS COURT SHOULD NOT IGNORE THE CONFLICT IN THE CIRCUIT COURTS	4
III. THE FOURTH PRONG OF THE PLAIN-ERROR TEST IS NOT THE ISSUE HERE	8
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Chapman v. California, 386 U.S. 18 (1967) 1, 2, 4

Neder v. United States, 527 U.S. 1 (1999) 4

Russell v. United States, 369 U.S. 749 (1962) 6

Stirone v. United States, 361 U.S. 212 (1960) 1, 2, 3, 4, 9

United States v. Brandao, 448 F. Supp. 2d 311 (D. Mass. 2006) 7

United States v. Brown, 400 F.3d 1242 (10th Cir. 2005) 4, 5

United States v. Cotton, 535 U.S. 625 (2002) ..... *passim*

United States v. Floresca, 38 F.3d 706 (4th Cir. 1994) (*en banc*) ..... *passim*

United States v. Griffin, 324 F.3d 330 (5th Cir. 2003) 5, 6

United States v. Magallanez, 408 F.3d 672 (10th Cir. 2005) 3

United States v. Milbourne, 129 Fed. Appx. 861 (4th Cir. 2005) 6

United States v. Mingo, ___ Fed. Appx. ___, 2007 WL 2301634 (4th Cir. 2007) 6

United States v. Murphy, 406 F.3d 857 (7th Cir. 2005), *cert. denied*, 546 U.S. 1097 (2006) 1, 2, 7

United States v. Olano, 507 U.S. 725 (1993) 4, 5

United States v. Rogers, 126 F.3d 655 (5th Cir. 1997) 3

TABLE OF AUTHORITIES – Continued

Page

United States v. Smith, 801 A. 2d 958 (D.C. 2002) 10

United States v. Thomas, 274 F.3d 655 (2d Cir. 2001) (*en banc*) 9

United States v. Torres, 901 F.2d 205 (2d Cir.), *cert. denied*, 498 U.S. 906 (1990) 3

STATUTES

18 U.S.C. § 1030 9

RULES

FED. R. CRIM. P. 52(a) 3

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW Petitioner Christopher Andrew Phillips, by and through his undersigned counsel, and respectfully submits this Reply Brief. Petitioner offers the following in reply to the Brief for the United States in Opposition:

THE GOVERNMENT'S ARGUMENT

In its brief in this case, the Government argues that the cases Petitioner cites are based on *Stirone v. United States*, 361 U.S. 212 (1960), but that *Stirone* was decided before *Chapman v. California*, 386 U.S. 18 (1967), which held that even constitutional errors are subject to a harm analysis. Brief for the United States at p. 11. According to the Government, this means that there is a "substantial question" whether the cases supporting Petitioner are still valid. *Id.*

Second, the Government urges that the Fourth Circuit should be given the chance to reconsider its decision in *United States v. Floresca*, 38 F.3d 706 (1994) (*en banc*) "in an appropriate case." Brief for the United States at p. 13. The Government asserts that the Fourth Circuit has not "addressed the rule of *Florseca*" since this Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), and asks that the lower courts be given more time to assess the effect of *Cotton* before this Court intervenes. *Id.* at p. 13, noting that this Court denied review in *United States*

v. Murphy, 406 F.3d 857 (7th Cir. 2005), *cert. denied*, 546 U.S. 1017 (2006). *Id.*

Finally, the Government contends that Petitioner cannot prevail in any event because the fourth prong of the plain-error standard has not been satisfied. *Id.* at p. 14. The evidence that Petitioner accessed a computer without authorization, the Government says, was "essentially uncontroverted"; a jury finding that Petitioner "transmitted" information necessarily included a finding that he "accessed" the computer. *Id.*

Petitioner now addresses these arguments in turn.

PETITIONER'S REPLY ARGUMENT

I. THIS COURT'S DECISION IN *CHAPMAN* DID NOT UNDERMINE ITS DECISION IN *STIRONE*.

It is certainly true, as the Government notes, that a constitutional error of the *Stirone* type could never have been harmless before *Chapman*. In *Stirone*, however, the defendant had objected at trial to the constructive amendment, *Stirone* at U.S. 271-72, so no question of "structural error" was presented, even if that concept had existed. This Court did not say that the error was reversible simply because it was a constitutional error, but focused on the harm caused by the error:

> The grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. *But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete.* And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted *solely* on the charge made in the indictment that the grand jury returned.

Stirone at 361 U.S. 217 (Emphasis added).

Moreover, to say that constitutional errors *can* be harmless is not to say that they *must* be harmless if no objection has been made. Indeed, several of the lower courts have suggested that the plain-error standard is relaxed when the error is a constitutional one. *See, e.g., United States v. Torres*, 901 F.2d 205, 228 (2d Cir.), *cert. denied*, 498 U.S. 906 (1990) (Constitutional errors "noticed more freely" under Rule 52(a)); *United States v. Rogers*, 126 F.3d 655, 658 (5th Cir. 1997) ("Increased scrutiny" given in plain-error review when "constitutional right is at stake"); *United States v. Magallanez*, 408 F.3d 672, 683 (10th Cir. 2005) (Plain-error test "applied less rigorously" where constitutional error alleged).

Finally, to the extent that the *Floresca* rule is characterized as "structural," Petitioner agrees with the Government that it appears inconsistent with the

plain-error rule established in *United States v. Olano*, 507 U.S. 725 (1973). The Government, however, has mischaracterized Petitioner's argument: Petitioner is not necessarily arguing that *Floresca* should be the law, but given that it and other decisions conflict with the Fifth Circuit's decision, this Court should grant review to say what the law is. Ironically, the Government makes the case for granting review with its recognition that there is a "substantial question" whether the lower courts analyzing constructive amendments have ignored the effect of *Chapman* and *Neder v. United States*, 527 U.S. 1 (1999). *See also United States v. Cotton*, *supra*, at 535 U.S. 625, 631 (citing *Stirone* only for the proposition that a defective indictment is a "jurisdictional" error, and rejecting that doctrine).

II. THIS COURT SHOULD NOT IGNORE THE CONFLICT IN THE CIRCUIT COURTS.

Unable to deny that the law is in flux as to whether a defendant must show prejudice under the plain-error doctrine, the Government wants the Court to ignore the conflict in the circuit courts. The Government apparently believes that the Fourth Circuit will eventually (sooner or later) come around to its point of view. After all, the Government observes, the Tenth Circuit has already abandoned its automatic reversal rule in *United States v. Brown*, 400 F.3d 1242, 1253, n. 6 (2005). Brief for the United States at pp. 14-15.

In *Brown*, however, the court did not decide the question presented here: must prejudice always be shown under the plain-error doctrine? Instead, the Tenth Circuit decided only, as this Court did in *Cotton*, that under the fourth prong of plain-error review, the defendant could not prevail because evidence of his guilt of the charged crime was "overwhelming." *Brown* at 400 F.3d 1254-55.

As will be seen, the Government wants to conflate the third and fourth prongs of *Olano*, and argue that Petitioner did not show "prejudice" here (the holding of the Fifth Circuit) because the evidence was allegedly so "overwhelming" that the Fifth Circuit, and this Court, would not have found the error serious enough to affect the fairness or integrity of the trial (a matter on which the Fifth Circuit did not rule, but which the Government wants this Court to decide in peremptory fashion).

What the Government overlooks is that an appellate court's approach to the prejudice issue may well affect its view of the fourth prong. If, for example, a court believes that no prejudice need be shown, or that there is a rebuttable presumption of prejudice, it may be more inclined to exercise its discretion and reverse a conviction.

The Fifth Circuit's decision in *United States v. Griffin*, 324 F.3d 330 (5th Cir. 2003), provides a useful example. In *Griffin*, the Fifth Circuit provided no analysis of the prejudice caused by an unobjected-to constructive amendment except to say that it could

not permit the district court to second guess "what was in the mind of the grand jury at the time it returned the indictment." *Id.* at 324 F.3d 355, quoting from this Court's decision in *Russell v. United States*, 369 U.S. 749, 770 (1962). To allow such an amendment, the court concluded, would violate the Fifth Amendment "and undermine the public's faith in the integrity of our judicial proceedings." *Id.*

This Fifth Circuit decision in 2003 appears to adopt the *Floresca* rule and at least assumes that no prejudice must be shown. And yet, just three years later in Petitioner's case, the Fifth Circuit applied a radically different standard, not even citing *Griffin*. Petitioner respectfully submits that where different panels of the same court are deciding the same issue in completely different ways, there can be no fairness.

Nor is it any answer to hope that things will just sort themselves out, without intervention by this Court. It may be literally true that the Fourth Circuit has not "addressed" the *Floresca* rule since *Cotton* was decided, but the Fourth Circuit has indicated at least twice, albeit in unpublished opinions, that it still approves of the *Floresca* rule. *See United States v. Milbourne*, 129 Fed. Appx. 861, 864 (4th Cir. 2005) (quoting *Floresca* rule but finding no constructive amendment); *United States v. Mingo*, ___ Fed. Appx. ___, 2007 WL 2301634 (4th Cir. 2007) ("Constructive amendments of a federal indictment. . . . are error *per se*.").

Finally, even if the *Floresca* court has the epiphany the Government anticipates, what of the other circuit courts? As the court observed in *United States v. Brandao*, 448 F. Supp. 311, 320-21 (D. Mass. 2006), the circuit courts are split into at least three camps on whether a defendant must show prejudice. The Fourth Circuit presumes prejudice, and holds that the error is *per se* reversible; the Second Circuit holds that prejudice has been shown *per se*; the Third Circuit "has crafted a middle-ground, holding that a rebuttable presumption of prejudice exists." *Brandao* at 448 F. Supp. 2d 320-21. And, of course, the Fifth Circuit apparently does what it wants to, but usually demands that the defendant show prejudice, as in Petitioner's case.

Petitioner cannot know, of course, why this Court denied review in *Murphy*, *supra*. Perhaps it was because the Petitioner there only pointed to the conflict between the Fourth and Seventh Circuits, or perhaps the Court at that time shared the Government's sanguine view that the Fourth Circuit would soon heal itself.

In any event, of course, the Court's denial of certiorari in *Murphy* is not an endorsement of the Seventh Circuit, or even a rejection of *Floresca*. The time has come to settle the debate, and only this Court can do it.

III. THE FOURTH PRONG OF THE PLAIN-ERROR TEST IS NOT THE ISSUE HERE.

The Government seeks to avoid review on the question presented, that of the need to show prejudice, by asserting that Petitioner is arguing in the alternative that "even if *Floresca* is no longer good law, the fourth prong of the plain-error standard is satisfied" because the evidence of the charged offense was not overwhelming. Brief for the States at p. 14. While Petitioner did assert that the evidence was not overwhelming, however, Pet. at p. 13, Petitioner observed that the Fifth Circuit, like this Court in *Cotton*, did not reach the fourth prong of the plain-error test. *Id.* Accordingly, even if the determination of the *fourth prong* might be "fact-bound," Brief for the United States at p. 14, the issue in this case is the *third prong,* i.e., a showing of prejudice.

Petitioner, therefore, is not arguing "in the alternative," and the Government's Brief is non-responsive. If the Fifth Circuit had simply declined to exercise its discretion here, a different question would be presented: whether *Cotton* dictates that a court should never exercise its discretion in the case of an unobjected-to constructive amendment (and, if it may, what considerations should guide it in deciding to exercise its discretion).

Petitioner submits that when the question is that of prejudice, the Court might want to look at the

evidence presented at trial, as it did in *Stirone*,[1] but the more important question is what the grand jury might have done. Following *Stirone*, several lower courts have concluded that prejudice is presumed because a reviewing court can never guess about this. *See, e.g., United States v. Thomas*, 274 F.3d 655, 670 (2d Cir. 2001) (*en banc*).

Perhaps, however, the Court might want to re-examine this assumption. In this case, for example, the indictment shows that the grand jury was presented with the entire factual basis constituting the alleged offense: the use of a "brute-force attack" program and an elaborate description of what Petitioner allegedly did. Presented with these facts, however, the grand jury indicted Petitioner only for "accessing," not "transmitting." Had the grand jury wanted to, it could have, of course, alleged both ways of violating 18 U.S.C. § 1030. It chose not to, even if one accepts the Government's notion that transmitting "information" constitutes "accessing."[2] Brief for

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[1] The *Stirone* Court's second reason for finding harm was that the Court could not determine "with certainty" that Stirone was convicted "solely" on the charged offense. *Id.* at 361 U.S. 217. If that was true in *Stirone*, where both theories of the offense were submitted to the jury in the alternative, *id.* at 361 U.S. 272, how could that be any less true here, where the charged offense was not submitted to the jury at all?

[2] Not surprisingly, the Government cites no caselaw for the proposition that transmitting "information" constitutes accessing. Every time a Justice of this Court logs on to Westlaw, does he or she "transmit" information? And, if so, why have the "accessing" subsection at all? Not to mention, of course, that the

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the United States at p. 14, n. 7. *Cf. United States v. Smith*, 801 A. 2d 958, 962 (D.C. 2002) (Fourth prong not satisfied where evidence supported charged offense *and* "indictment included a citation that encompassed both subsections" of statute).

In short, the gravamen of a constructive amendment error is that it violates the defendant's right to be *charged by the grand jury*; the fact that the evidence may support the charged offense does not mean the grand jury would necessarily have indicted on the uncharged offense. Accordingly, while the quality of the proof at trial may constitute circumstantial evidence of what the grand jury might have done, the indictment may provide far better proof. At least for the purpose of determining prejudice, this Court should not adopt the *Cotton* test, which was intended to apply to a different prong of the plain-error test.

Fifth Circuit believed Petitioner had transmitted a "program," the theory actually argued to the jury, as opposed to the new one just appearing in the Government's brief.

CONCLUSION

It is up to the Government to indict the defendant before trial, not at the end of it. This Court should grant review to determine whether a failure to object relieves the Government of that duty where no objection is made at trial.

Respectfully submitted,

TERRENCE W. KIRK
Texas Bar No. 11513500
502 West 13th Street
Austin, Texas 78701
(512) 236-8511
(512) 476-5346 (Fax)
Counsel for Petitioner